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Vol. V

TRANSCRIPT OF RECORD

(Pages 1993 to 2490)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 228

NYE & NISSEN (A CORPORATION), AND ABRAHAM MONCHARSH, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1948.

CERTIORARI GRANTED OCTOBER 25, 1948.

No. 11308

United States
Circuit Court of Appeals
For the Ninth Circuit.

NYE & NISSEN, a Corporation, and ABRAHAM MONCHARSH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Ten Volumes
VOLUME V
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Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

(Testimony of G. Wallace Ryuerson.)

A. It varies in size. Sometimes there are small spots, too——

Q. What?

A. And it might be as large as an inch in diameter.

Q. What kind of spots did you see in the eggs? How many different kinds of spots?

A. As far as spots are concerned, [1795] there would be the moldy spots. There were spot rots if that is what you are referring to.

Q. You have a column of spots.

A. Yes, that refers to spot rots.

Q. Pardon me?

A. That refers to spot rots.

Q. What is a spot rot?

A. When an egg is lying in one position the yolk falls and eventually adheres to the shell and decomposes there, forming a rot. It shows up usually as a bright red spot under the candle.

Q. So it appears as a red spot under the candle?

A. A dark red spot.

Q. What? A. A dark red spot.

Q. A dark red spot on the shell?

A. Yes, it would be adhering to the shell.

Q. Against the shell? A. Yes, sir.

Q. How can you tell, Mr. Ryuerson, whether the spot that you saw against the shell is due to a former adherence of the yolk there, or from the penetration of the mold through the shell of the egg? How do you tell that?

(Testimony of G. Wallace Rynerson.)

A. Well, a moldy egg shows up as a very dense black spot. Spot rot is more of a deep red spot.

Q. In other words, the distinction is in the color?

A. Yes, in general appearance.

Q. Pardon me. The general appearance?

A. Yes.

Q. Are they similar in size?

A. No, not necessarily. [1796]

Q. Which is the larger?

A. The spot rot ordinarily.

Q. The spot rot ordinarily is larger?

A. A moldy egg might have a spot that large.

Q. In the instances where you saw and observed an egg moldy on the inside, were those eggs moldy on the outside? A. No, not always.

Q. Well, in any instances?

A. As I say, I seem to recall in the last crate there some of them were moldy on the outside. I am not positive on the——

Q. Did you compare the conclusions you reached in respect to the spot rots and the rotten eggs, so-called bad eggs here, with the other inspectors?

A. That represented a concurrence of opinion.

Q. What?

A. That represented a concurrence of opinion.

Q. In other words, your record is the concurrence of opinion of those who were engaged in the operation, is that right? A. Yes.

Q. At any time in order to reach that concurrence of opinion, did you compare any record in

(Testimony of G. Wallace Ryuerson.)

which you reached a conclusion different than either Mr. Bradway or Mr. Wirth?

A. Well, I think in one instance—I believe it was on Case No. 3—on a recheck it seems to me Mr. Wirth had noted twenty-three mold, whereas I had noted twenty-one.

Q. How many inedible eggs did you list for Case 3? A. Thirty-four. [1797]

Q. Thirty-four? A. Yes.

Q. And there was a difference of two in the moldy eggs, is that right?

A. I believe that is right.

Q. How many did you notice in Case 2?

A. Fifteen.

Q. How many? A. Fifteen.

Q. How many did your records show in Case 4?

A. Forty.

Q. Case 5? A. Six.

Q. Case 6? A. Eight.

Q. And Case 1? Three? A. That is right.

Q. Now, isn't that error an error in counting the eggs rather than an error in opinion as to whether they were or were not inedible?

A. It might have been.

Q. So before you left that boat everybody was in agreement? A. Yes.

Q. Now, I will ask you this, Mr. Ryuerson: Isn't it a fact that all that that book shows, and all that you did as inspector for the Food and Drug Department, was to put in a book the results of the candling of these other people?

(Testimony of G. Wallace Rynerson.)

A. I wouldn't say that.

Q. Where am I wrong?

A. I observed the condition of the eggs myself.

Q. After you left the boat you filed no charge against the firm of Nye & Nissen, did you, for violating the Food and Drug law?

A. That is right.

Mr. Faulkner: That is all. [1798]

The Court: The jurors may take a recess.

(Recess.) [1798-a]

The Court: Proceed.

Mr. Faulkner: Q. Mr. Rynerson, I will ask you to look at this box here. Have you ever seen that box before?

A. I think that is one of the boxes that was in this particular lot.

Q. Were you there when it was removed and the initials were placed on it by Mr. Wirth?

A. No, I was not.

Q. Are your initials on there?

A. No, I don't think so.

Q. Did you preserve any box yourself?

A. No.

Q. Will you look at that box and tell me if that box is typical of the type that you saw down there in Los Angeles in November 1943?

A. The box was in a little better shape at that time. It has become a little bit warped and dirty since then.

Q. I mean, is it typical of the boxes there?

A. Otherwise, it is similar.

(Testimony of G. Wallace Rynerson.)

Q. Similar? A. Yes.

Q. You expressed an opinion, Mr. Rynerson, that these cases had not been opened prior to the opening by you people? A. Yes.

Q. Did you see the cases opened, all of them, the ten cases and the six cases? A. Yes.

Q. Did you participate in opening any of them?

A. I opened some, myself.

Q. Will you look at this box and I will ask you to express an opinion whether that box had ever been opened before?

A. I couldn't say now; it has probably been——

Q. Just look at it and answer the question.

A. Probably it has been opened, of course.

Q. What? A. It has been opened.

Q. In other words, Mr. Rynerson, can you look at that box in its present condition and express an opinion to me how many times the cover has been nailed on that box, and by "box" I am referring to Exhibit 129.

Mr. Pratt: I object to this. The witness has stated that he is not familiar with this box and it was not open when he was present and he certainly hasn't qualified as an expert, and that is what he is being asked for, an expert opinion.

Mr. Faulkner: I made that objection when Mr. Pratt brought out the testimony that it called for the opinion and conclusion of the witness and I made that objection.

Mr. Pratt: That was a different situation.

Mr. Faulkner: No, you asked if the box down in

(Testimony of G. Wallace Rynerson.)

Los Angeles on the third and fourth had ever been opened before and I objected on the ground it called for expert testimony and for the opinion and conclusion of the witness and Mr. Pratt resisted the objection and the Court ruled with Mr. Pratt.

Mr. Pratt: The situation was far different. Mr. Wirth was on the stand and he had handled the box and removed the cover and the box was in the same condition as it was when he opened it except for the removal of the eggs and the warping [1800] consequent upon the interval between that time and now.

Mr. Faulkner: I think the record developed before the Court and Jury in this case is that the Government brought this box in and produced a witness——

Mr. Pratt: All right, I will withdraw the objection.

The Court: Read the question.

(Question read.)

The Witness: That will be difficult to say. It looks like it had been nailed on once.

Mr. Faulkner: Q. Nailed on only once?

A. It might be in my judgment. There don't seem to be more than one set of nail holes.

Q. In other words, your opinion of the box is the cover that appears there has been nailed on only once? A. Yes.

Q. It is the same type of examination you made of other boxes that you made of this box on which you base your opinion that those covers had been nailed on only once?

A. It was a little more difficult than this, be-

(Testimony of G. Wallace Rynerson.)

cause the boxes didn't have these torn places on the lids.

Q. Have what?

A. Didn't have these torn places on the lids; in other words, the only places where there were nail holes were places where nails were in there.

Q. Is that your testimony then, that this is not a typical box?

A. I am satisfied that is one of the boxes that was in the shipment. [1801]

Q. Is it a typical cover?

A. The cover didn't appear that way at the time. That hadn't been opened at the time.

Q. You couldn't examine the nail holes, Mr. Rynerson, without taking off the cover?

A. There is no nail holes except where the nails were.

Q. If you didn't take the cover off, you wouldn't know how many nail holes there were?

A. I am speaking of the nail holes in the lid.

Q. You mean the nail holes in the lid solely, is that the point?

A. That is the way they were at the time.

Q. How about nail holes in the cases themselves; didn't you examine that?

A. On those we opened there were no other nail holes.

Q. Is this typical of the type of case that you opened, Exhibit 129?

A. Except for the battered condition.

Q. Except for the battered condition of the top?